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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

Arnold et al.

Group No.: 3739

Serial No.: 09/815,877

Examiner: R. S. Rollins

Filed: March 23, 2001

Docket No. AUGA15000005

For: **A WARMING APPARATUS WITH AN INFLATABLE COVER AND AN
INLET PORT PLUG**

CERTIFICATION UNDER 37 CFR § 1.8

I hereby certify that the documents referred to as enclosed herein are being deposited with the United States Postal Service as first class mail on this date March 11, 2005, in an envelope addressed to:
Assistant Commissioner for Patents, Washington, D.C. 20231

March 11, 2005

Date

Signature

Timothy A. Neal

MAIL STOP: APPEAL BRIEF-PATENTS
Commissioner for Patents
P. O. Box 1450
Alexandria, VA. 22313-1450

Sir:

APPLICANTS' BRIEF ON APPEAL

In response to the Final Action mailed November 2, 2004 and in view of the Notice of Appeal mailed January 13, 2005, the applicants submit this Brief on Appeal.

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REAL PARTY IN INTEREST

The real party in interest is ARIZANT TECHNOLOGIES INC., the owner by assignment from AUGUSTINE MEDICAL, INC. dated March 24, 2003.

RELATED APPEALS

The applicants have previously submitted a Notice of Appeal (mailed 9/8/2003) and an Appeal Brief (mailed 11/10/2003) in this matter.

Appeals have been submitted in the following applications, all of which are commonly owned with this application:

SN 08/624,101 for "Inlet Port Plug for Inflatable Blanket", now US Patent No. 5,997,572; Notice of Appeal mailed 3/30/1999;

SN 08/855,061 for "Thermal Blanket", pending; Applicants' Brief mailed 2/27/2001 and Supplemental Reply Brief mailed 6/28/2002;

SN 08/756,959 for "Thermal Blanket", now abandoned; Notice of Appeal mailed 9/18/2000; and

SN 90/004,529 for "Thermal Blanket", now US Patent No. RE38,462; Notice of Appeal mailed 10/23/2001.

STATUS OF THE CLAIMS

The claims are presented in Appendix I. Claims 1-33, 38, 39, 41-43, 48-53, 55, 59, 60, 62-64, 69 and 71 are cancelled. Claims 34-37, 40, 44-47, 54, 56-58, 61, 65-68, and 70 remain in the application.

Claims 34, 35, 54 and 56 are finally rejected. Claims 36, 37, 40, 44-47, 57-59, 61, 65-68 and 70 are objected to.

The applicants appeal the final rejection of claims 34, 35, 54, and 56.

STATUS OF AMENDMENTS

No Amendments have been filed subsequent to the Final Rejection.

SUMMARY OF CLAIMED SUBJECT MATTER

Claim 34:

Claim 34 recites the steps of method for controlling airflow through an inflatable device having two or more inlet ports for admitting airflow into the device. In FIGS. 15

and 16, for example, inflatable thermal blankets 1501 and 1601 are illustrated. Each of the thermal blankets has inlet ports such as are shown in FIGS. 2, 3, 5, 6, and 11-14. The method includes the step of “providing a plug” such as the plugs shown in FIGS. 1, 4, 7A and B, 8A and B, for example. The step of placing the plug in an inlet port and retaining the plug in the inlet port is shown in the enlarged insets of FIG. 15 and 16 and is described with reference to one of the embodiments at page 6, lines 3-14. The step of “introducing an airflow into the device through another inlet port” is described in the Background section at page 1, lines 24-26. Finally, “the plug restricting egress of the airflow through the other inlet port” is clearly set forth in the specification at page 1, lines 5-7.

Claim 35:

Claim 35 recites the elements of “an apparatus for warming a person”. Such apparatuses are shown in FIGS. 15 and 16 and are discussed in the specification at page 8 lines 8-11. The apparatus includes an inflatable cover for disposition on a portion of a person's body (see the elements 1501 and 1601 in FIGS. 15 and 16, for example), two inlet ports in the inflatable cover (visible in FIGS. 15 and 16), and a plug removably received in at least one port of the two ports (visible in the enlarged portions of FIGS. 15 and 16).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Claims 34, 35, and 54 are rejected for anticipation by US Patent 5,360,439 (“Dickerhoff”).

Claims 35 and 56 are rejected for obviousness over Dickerhoff in view of US Patent 5,304,213 (“Berke”).

ARGUMENTAnticipation

Axiomatically, rejection of a claim for anticipation by a reference requires that the reference include every element of the rejected claim. If an element is omitted but considered inherent in the reference, extrinsic evidence must be introduced to establish that the omitted element is necessarily in the thing described in the reference. Further, the reference must enable the invention recited in the rejected claim. Finally, the anticipating reference must describe the claimed invention sufficiently to have put the reasonably skilled artisan in possession of it. See MPEP 2131 and 2131.01. See also *In re Spada*, 15USPQ2d 1655 (Fed. Cir. 1990).

Claims 34, 35, and 54 are rejected for anticipation by Dickerhoff.

Claim 34 is directed to a method to control airflow through an inflatable device having two or more inlet ports for admitting airflow. The method includes steps of “providing a plug”, placing and retaining “the plug” in an inlet port, and introducing airflow through another port, with “the plug” restricting the egress of air from the plugged inlet port.

Claim 35 covers a warming apparatus with an inflatable cover, two inlet ports in the cover, and “a plug removably received” in at least one of the inlet ports. Claim 54 limits the inflatable cover of claim 35 to one for “transverse disposition” across a person’s chest.

Dickerhoff discloses a warming blanket with multiple “resealable” inlets which may be closed by permanent seals or “by means such as an adhesive strip, double-sided tape, snaps, zippers, folding flaps, or a ziplock type seal.” Dickerhoff’s preferred embodiment for sealing the inlets is “hook and loop fastener strips.” See Dickerhoff at col. 3, lines 13-20.

The contention in the Office Action of 2/11/2004 was that the “snap used by Dickerhoff as a means for closing the port is understood by the Examiner to be a plug.” The applicants respectfully disagree.

The term “plug” is not defined in the specification, and therefore must be given its plain meaning. In other words, “plug” must be read as it would be interpreted by one ordinarily skilled in the art. See MPEP 2111.01, page 2100-48. The term “plug” is defined in *Webster’s New Collegiate Dictionary* (Merriam-Webster, 1974) as “a piece used to fill a hole: STOPPER”. Similarly, the *McGraw-Hill Dictionary of Scientific and*

Technical Terms, Fifth Edition (McGraw-Hill, 1994) defines a plug as “a piece of material used to fill a hole.” This definition comports with the many inlet port plug embodiments taught in this application. In each case, the embodiment is an element used to fill a hole in an inlet port plug. See, for example, FIGs 2, 3, 11, 12, 15, and 16. In each case a hole in an inlet port is filled with a plug.

The question is whether the reasonably skilled artisan, with either of these definitions, would read Dickerhoff’s “snap” as a “plug”. The applicants submit that the artisan would not.

The “snaps” that Dickerhoff describes are used to initially close inlet ports so as to permit them to be opened and then “reclosed.” See Dickerhoff at col. 3, lines 13-16. But the term “snaps” is not defined by Dickerhoff. Therefore, one must read this term in the same way as the term “plug” is read: that is, as it would be interpreted by one ordinarily skilled in the art. In this regard *Webster’s* defines the term “snap” as “a catch or fastening that that closes or locks with a click.” The structure of a “snap” is suggested by definitions of a “snap fastener” found in both *Webster’s* and *McGraw Hill*. For example, *Webster’s* defines a snap fastener as “a metal fastener consisting essentially of a ball and socket attached to opposed parts of an article and used to hold meeting edges together.” These definitions correlate with the apparently sleeve-like construction of the inlet ports 30 and 40 in Dickerhoff. However, Dickerhoff does not provide any illustration of a “snap” closing or sealing either of the inlet ports 30, 40 with which to make a visual comparison with the many illustrations of plug embodiments in this application. Dickerhoff does not show any inlet port structure with a hole capable of being filled with a “plug”. Further, it is not apparent how the holes in the inlet ports of this patent application could be closed by “snapping.”

In fact, there is nothing in any of the plain meaning of the term “snap” or the term “snap-fastener” to indicate that the term “snaps” would, without more, encompass a “plug”. Neither is there anything in the plain meaning of the term “plug” to indicate that it would, without more, encompass a “snap”.

In defense of the rejection, the examiner has argued in the Final Action the a “snap does in fact meet the dictionary definition of a plug especially in view of how the snap is used in the Dickerhoff reference”. The reason given is that “a snap could be used to close the inlet port, which essentially is a hole”. The applicants respectfully disagree, for two reasons.

First, the applicants have established by citation to two references¹ that the definition of a “plug” is different and distinct from the definition of a “snap”. In this regard, it is noted that neither of the cited references uses either of the terms “snap” and “plug” as synonym for or an example of the other. Second, it is manifest that a snap is not a plug in structure or in operation. That is to say, a snap is a ball and socket, not a piece of material that fills a hole; a plug is manifestly a material member that is received in and fills a hole, not a ball and socket that retains opposing edges together. Consequently Dickerhoff’s description of inlet port closure by a snap omits “placing” and “retaining” or “removably receiving” a “plug” in an inlet port. The examiner must introduce extrinsic evidence establishing that “placing” and “retaining” or “removably receiving” a “plug” in an inlet port are necessarily in Dickerhoff’s description. According to MPEP 2131.01 III, such evidence should be in the form of a reference.

The rejection of claims 34, 35, and 54 for anticipation by Dickerhoff is further traversed for the failure of Dickerhoff to enable or describe the invention of these claims. Dickerhoff discloses a sleeve-like inlet port that may be closed “by means such as an adhesive strip, double-sided tape, snaps, zippers, folding flaps, or a ziplock type seal”, or preferably by “hook and loop fastener strips”. Dickerhoff does not include a “plug” in this list. The “plug” and the acts and functions it supports are explicitly recited in the rejected claims and are set forth and illustrated in detail in the specification and drawings. The many ways in which the “plug” is constructed and used with an inlet port are described in detail in this application. Yet there is not a single illustration of either a “plug” or “snap” in Dickerhoff, nor is there any description of how such elements are constructed and operated. How would the skilled artisan, with Dickerhoff at hand, be enabled to make and use the invention of claims 34, 35, and 54? The answer is: he would not. What description in Dickerhoff puts the skilled artisan in possession of the invention of the rejected claims? The answer is: there is none.

Therefore Dickerhoff fails to satisfy the *prima facie* requirements of anticipation with respect to claims 34, 35, and 54, and the Board should instruct the examiner to withdraw this rejection.

¹ Webster’s New Collegiate Dictionary and the McGraw-Hill Dictionary of Scientific and Technical Terms, both of record in this application.

Obviousness:

Claims 35 and 56 are rejected for obviousness over Dickerhoff in view of Berke.

According to MPEP 2142, et seq, rejection of a claim for obviousness over a combination of references requires, *prima facie*, motivation to combine the references, a reasonable expectation of success, and the inclusion of all elements of the rejected claim in the combination.

Dickerhoff discloses an inflatable warming blanket with sleeve-like inlet ports 30 and 40. From the description at col. 3, lines 36-41, the sleeves appear to be flexible tubes, much like the sleeves of a shirt, without any rigid or semi-rigid structural features. The way to close such a sleeve is by bringing edges of the end of the sleeve together and fastening them to each other by means of adhesive strip, double-sided tape, snaps, zippers, folding flaps, a ziplock type seal, or hook and loop fastener strips. Berke, on the other hand, discloses an inlet port constituted of a "semi-rigid" collar that ensures that the flexible walls of hyper-hypothermia blanket will not collapse or partially fold at the opening of the collar. See Berke at col. 5, lines 10-16. Clearly a semi-rigid collar with an opening as taught by Berke cannot be closed or sealed by any of the means taught by Dickerhoff to close sleeve-like inlet ports.

Further, Berke discloses only one hyper-hypothermia blanket embodiment with two inlet ports. Each port is closed with a pull-seal label or a thin membrane. Neither has any means for re-closing once the label is pulled or the membrane broken. Resealing inlet ports is simply not a problem that Berke addresses, much less solves.

Accordingly, because of the inappropriateness of Dickerhoff's reclosing devices to Berke's inlet port structure, and because Berke does not recognize the problem of reclosing inlet ports, there is no suggestion to combine Berke with Dickerhoff.

How would the skilled craftsman visualize closing Berke's semi-rigid collar with Dickerhoff's adhesive strip, double-sided tape, snaps, zippers, folding flaps, a ziplock type seal, or hook and loop fastener strips? The only conceivable way in which any of Dickerhoff's fasteners will work in closing an inlet port is by having edges of the port brought together in order for closure of the port to occur. But Berke's inlet port design is constituted of a semi-rigid collar with an opening for receiving and supporting the end of an air hose in an inflatable blanket. Such a collar is not intended to be folded in half upon itself when the blanket is inflated. Accordingly, there is no reasonable prospect of success in the combination of Dickerhoff with Berke.

Finally, neither Dickerhoff nor Berke teaches or suggests "a plug" in an inlet port. As previously argued, the plain meaning of the term "snap" used by Dickerhoff does not encompass "a plug". Berke teaches only a pull seal label or a thin membrane to close an inlet port.

Accordingly, the combination of Berke with Dickerhoff does not meet the requirements for *prima facie* obviousness with respect to claims 35 and 56.

To these arguments, the examiner, in the Final Action replies that, since a snap, comprises a metal fastener, "which is understood by the examiner to be a semi-rigid material at least", "Dickerhoff's mechanism could in fact be used within a semi-rigid structure because of its own semi-rigid properties". The applicants submit that Dickerhoff's "mechanism" is a snap. A snap is used to bring and hold opposing edges of material together, such as those of a garment or a sleeve of flexible material forming an inlet in Dickerhoff's warming blanket, not opposing sides of a semi-rigid collar when Berke's hypo-hyperthermia blanket is inflated. Nevertheless, if, as the examiner says, a snap could in fact be used to close Berke's semi-rigid collar it would be releasably retained on the collar, not "removably received" in the collar.

Conclusion

In view of the remarks made in this paper, it is submitted that all of the claims in this application define subject matter that is patentably distinct from the references of record. Accordingly, the Board is respectfully requested to instruct the Examiner to indicate allowance of these claims.

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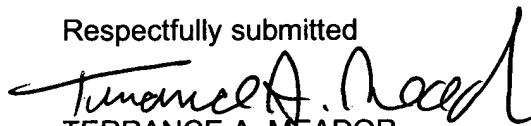
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APPENDIX I

CLAIMS

1-33. (Canceled)

34. (Previously presented) A method for controlling airflow through an inflatable device having two or more inlet ports for admitting airflow into the device, the method comprising the steps of:

providing a plug;
placing the plug in an inlet port and retaining the plug in the inlet port;
introducing an airflow into the device through another inlet port; and
the plug restricting egress of the airflow through the other inlet port.

35. (Previously presented) An apparatus for warming a person, comprising:
an inflatable cover for disposition on a portion of a person's body;
two inlet ports in the inflatable cover; and
a plug removably received in at least one port of the two ports.

36. (Previously presented) The apparatus of claim 35, the plug including:
a planar central body; and,
a plurality of extensions coplanar with the central body and which extend from the central body, at least two of which are receivable in the one port.

37. (Previously presented) The apparatus of claim 36 wherein at least one of the extensions is curved.

38. (Canceled)

39. (Canceled)

40. (Previously presented) The apparatus of claim 36 wherein at least one of the extensions is formed from a resilient material.

41-43. (Canceled)

44. (Previously presented) The apparatus of claim 36 wherein the plug is a plastic material.

45. (Previously presented) The apparatus of claim 36 wherein the plug is a wood pulp material.

46. (Previously presented) The apparatus of claim 36 wherein the plurality of extensions includes an even number of opposing extensions.

47. (Previously presented) The apparatus of claim 46 wherein the plurality of extensions includes two pairs of opposing extensions.

48-53. (Canceled)

54. (Previously presented) The apparatus of claim 35, wherein the inflatable cover is for transverse disposition across the chest of a person's body.

55. (Canceled)

56. (Previously presented) The apparatus of claim 35, wherein:
the first inlet port includes a first sheet of flexible material attached to the inflatable cover and a hole adapted to receive the nozzle of an air hose; and
the second port includes a second sheet of flexible material attached to the inflatable cover and a hole adapted to receive the nozzle of an air hose.

57. (Previously presented) The apparatus of claim 56, the plug including:
a planar central body; and,
a plurality of extensions coplanar with the central body and which extend from the central body, at least two of which are receivable in the hole of the first sheet and in the hole of the second sheet.

58. (Previously presented) The apparatus of claim 57 wherein at least one of the extensions is curved.

59. (Canceled)

60. (Canceled)

61. (Previously presented) The apparatus of claim 57 wherein at least one of the extensions is formed from a resilient material.

62-64. (Canceled)

65. (Previously presented) The apparatus of claim 57 wherein the plug is a plastic material.

66. (Previously presented) The apparatus of claim 57 wherein the plug is a wood pulp material.

67. (Previously presented) The apparatus of claim 57 wherein the plurality of extensions includes an even number of opposing extensions.

68. (Previously presented) The apparatus of claim 67 wherein the plurality of extensions includes two pairs of opposing extensions.

69. (Canceled)

70. (Previously presented) The apparatus of claim 57, wherein the inflatable cover is for transverse disposition across the chest of a person's body.

71. (Canceled)